

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JONATHAN (JOHN) E. FOSTER,	§
	§ No. 155, 2012
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0703031898
	§
Plaintiff Below-	§
Appellee.	§

Submitted: May 2, 2012  
Decided: June 1, 2012

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices

**ORDER**

This 1<sup>st</sup> day of June 2012, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Jonathan (John) E. Foster, filed an appeal from the Superior Court's February 28, 2012 order denying his third motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, the State of Delaware, has moved to affirm the

Superior Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.<sup>1</sup> We agree and affirm.

(2) The record before us reflects that, in September 2007, Foster was found guilty by a Superior Court jury of Burglary in the Second Degree, Robbery in the Second Degree and Burglary in the Third Degree. He was sentenced as a habitual offender to 10 years of Level V incarceration on the second degree burglary conviction, to 8 years at Level V on the second degree robbery conviction and to 18 months at Level V, to be suspended for 18 months at Level III probation, on the third degree burglary conviction.<sup>2</sup> Foster's convictions were affirmed by this Court on direct appeal.<sup>3</sup> The denial of Foster's first postconviction motion was affirmed by this Court.<sup>4</sup>

(3) In this appeal, Foster claims that his trial was fundamentally flawed because the State could not locate his police booking photograph prior to trial.

(4) Because Foster's claim was raised, unsuccessfully, in both his first and second postconviction motions, he is procedurally barred from raising it in these proceedings.<sup>5</sup> In the absence of any basis for addressing

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<sup>1</sup> Supr. Ct. R. 25(a).

<sup>2</sup> Foster's sentence for second degree robbery was later reduced to 7 years at Level V.

<sup>3</sup> *Foster v. State*, 961 A.2d 526 (Del. 2008).

<sup>4</sup> *Foster v. State*, Del. Supr., No. 87, 2010, Holland, J. (Aug. 2, 2010). Foster did not file an appeal from the Superior Court's denial of his second postconviction motion.

<sup>5</sup> Super. Ct. Crim. R. 61(i) (4).

the claim once again in the interest of justice,<sup>6</sup> we conclude that the Superior Court properly denied it.

(5) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice

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<sup>6</sup> Id.